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No. 91-28

In the Supreme Court of the United States

OCTOBER TERM, 1991

MATTIE LOU THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had authority to impose a sentence of probation pursuant to a "substantial assistance" motion by the government under 18 U.S.C. 3553(e), despite the absolute bar on probationary sentences contained in 21 U.S.C. 841(b)(1)(A)(i).

2. Whether the district court properly relied on factors unrelated to the quality of petitioner's assistance to the government in determining what sentence to impose in response to a "substantial assistance" motion made by the government pursuant to 18 U.S.C. 3553(e).

3. Whether petitioner's family responsibilities justified a departure under Sentencing Guidelines § 5H1.6 from the ten-year mandatory minimum sentence imposed by 21 U.S.C. 841(b)(1)(A)(i).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 111 S. Ct. 1854 (1991)	12
Rodriguez v. *United States*, 480 U.S. 522 (1987)	6
United States v. *Brand*, 907 F.2d 31 (4th Cir.), cert. denied, 111 S. Ct. 585 (1990)	10-11
United States v. *Brewer*, 899 F.2d 503 (6th Cir.), cert. denied, 111 S. Ct. 127 (1990)	11
United States v. *Burch*, 873 F.2d 765 (5th Cir. 1989)	11
United States v. *Daiagi*, 892 F.2d 31 (4th Cir. 1989)	6
United States v. *Sharp*, 883 F.2d 829 (9th Cir. 1989)	10
United States v. *Shortt*, 919 F.2d 1325 (8th Cir. 1990)	10
United States v. *Wilson*, 896 F.2d 856 (4th Cir. 1990)	6, 9

Statutes and regulations:

18 U.S.C. 1952(a)(3)	7
18 U.S.C. 3553(e)	2, 3, 4, 5, 6, 7, 8, 9, 10, 11
18 U.S.C. 3559	6, 7
18 U.S.C. 3561(a)(1)	6
21 U.S.C. 841(a)(1)	2
21 U.S.C. 841(b)(1)(A)	3, 4, 5, 6, 7
21 U.S.C. 841(b)(1)(A)(i)	2
Sentencing Guidelines (1989):	
§ 2D1.1(a)(3)	2
§ 5H1.6	4, 9, 10, 11, 12
§ 5K1.1	4, 8-9

Miscellaneous: Page

56 Fed. Reg. (1991):
p. 22,762 11
p. 22,779 12
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 930 F.2d 526.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12) was entered on April 11, 1991. A petition for rehearing was denied on May 23, 1991. Pet. App. 13. The petition for a writ of certiorari was filed on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Northern District of Illinois, petitioner

was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced her to a five-year term of probation. Pet. App. 17. The court of appeals vacated the sentence and remanded for resentencing. Pet. App. 1-11.

1. Petitioner was arrested for possession of almost four kilograms of heroin. Pet. App. 1. Because her offense involved more than one kilogram of heroin, she was subject to a statutory minimum sentence of ten years' imprisonment under 21 U.S.C. 841(b)(1)(A)(i). The presentence report calculated petitioner's range under the Sentencing Guidelines at 151-188 months' imprisonment, based on an offense level of 34 and a criminal history category of I. Presentence Report 11-12.[1] Because petitioner cooperated with the government's investigation of her associates, the government filed a recommendation pursuant to 18 U.S.C. 3553(e), suggesting that a sentence of only six years would be appropriate. Pet. App. 1.

2. The district court accepted the government's recommendation for a reduction below the statutory minimum sentence, but the court went farther. It decided not to sentence petitioner to any term of imprisonment, but instead to place her on five years' probation, with the condition that she perform 1200 hours of community service. Pet. App. 15-17. The court first ruled that it had authority to impose a sen-

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[1] The version of Sentencing Guidelines § 2D1.1(a)(3) (1989) then in effect assigned a base offense level of 34 for possession of more than three, but less than ten, kilograms of heroin with intent to distribute. Presentence Report 2. Petitioner received an increase of two levels for her aggravated role in the offense, *id.* at 2-3, and a deduction of two levels for acceptance of responsibility, *id.* at 3, resulting in a final offense level of 34.

tence of probation, even though 21 U.S.C. 841(b)(1)(A) expressly prohibits such a sentence for the drug offense to which petitioner pleaded guilty.[2] The court reasoned that the probation bar does not apply when the government files a substantial assistance motion, because the sentence is then imposed under 18 U.S.C. 3553(e), which does not prohibit a sentence of probation.[3] Pet. App. 2-3. The district court based its decision not to impose a sentence of imprisonment on petitioner's family responsibilities for two mentally

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[2] Section 841(b)(1)(A) provides in pertinent part:

> Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this section involving—
>
> (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
>
> * * * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years * * *. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph.

[3] Section 3553(e) provides:

> Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

disabled adult children and a four-year-old grandson who were living with her. *Id.* at 6.

3. The court of appeals vacated the sentence and remanded for resentencing. Pet. App. 1-11. It first ruled that 18 U.S.C. 3553(e) did not authorize the district court to impose a sentence of probation because the plain language of 21 U.S.C. 841(b)(1)(A) prohibited a sentence of probation "[n]otwithstanding any other provision of law." Pet. App. 1-5.

Because it was remanding the case for resentencing, the court also considered the basis on which the district court justified the extent of its departure below the ten-year mandatory minimum sentence. Pet. App. 5-9. Based on the language of 18 U.S.C. 3553(e) and the related provisions of Sentencing Guidelines § 5K1.1, the court concluded that a reduction in petitioner's sentence below the statutory minimum sentence could be based only on factors relating to the quality of petitioner's cooperation. Pet. App. 5-6. The court went on to reject petitioner's claim that her extremely burdensome family responsibilities could justify a departure under Sentencing Guidelines § 5H1.6.[4] Noting that the Guideline explicitly states

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[4] At the time of petitioner's sentencing, Sentencing Guidelines § 5H1.6 (1989) provided:

> Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.

that family responsibilities are relevant when probation is a sentencing option, the court concluded that family responsibilities therefore never can be relevant in a case in which probation is not a sentencing option. Pet. App. 7-8. Because the court of appeals already had concluded that petitioner was not eligible for probation, it held that the ten-year statutory minimum sentence could not be reduced on the basis of petitioner's family responsibilities.

ARGUMENT

Because the court of appeals accepted the government's argument that the district court erred in declining to impose a sentence of imprisonment, the case must return to the district court for resentencing. Accordingly, the judgment in this case is not final. Although the lack of finality does not affect the jurisdiction of this Court in cases coming from federal courts, it is a prudential consideration that has caused the Court rarely to grant petitions for certiorari in such cases. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.2 (6th ed. 1986). No special circumstances require a departure from that practice in this case. In any event, petitioner's contentions do not warrant plenary review.

1. Petitioner first contends (Pet. 7-11) that the district court had authority to impose a sentence of probation in response to the government's "substantial assistance" motion under 18 U.S.C. 3553(e), despite the absolute bar on probationary sentences set forth in 21 U.S.C. 841(b)(1)(A).

As the court of appeals noted (Pet. App. 2-4), the plain language of 21 U.S.C. 841(b)(1)(A) directly refutes this contention. In addition to specifying a ten-year minimum sentence for the offense to which

petitioner pleaded guilty, 21 U.S.C. 841(b)(1)(A) provides: "Notwithstanding any other provision of law, the court shall not place on probation * * * any person sentenced under this subparagraph." Because the only circumstance in which a court can even consider imposing a sentence of less than ten years on a person to whom this provision applies is when the government has filed a substantial assistance motion under 18 U.S.C. 3553(e), the separate prohibition on probationary sentences can have meaning only in cases in which the government has filed such a motion. Petitioner's contention that the probation ban does not apply in such cases leaves the probation ban completely superfluous. The court of appeals correctly rejected this contention. See *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987) (construing similar language in analogous statutory provisions "to make [the probation statute] unambiguously inapplicable").

Contrary to petitioner's argument (Pet. 9-11), the court of appeals' decision does not conflict with *United States* v. *Daiagi*, 892 F.2d 31 (4th Cir. 1989), or *United States* v. *Wilson*, 896 F.2d 856 (4th Cir. 1990). In *Daiagi*, the Fourth Circuit held that in response to a Section 3553(e) motion a district court may impose a sentence of probation for a Class B felony despite 18 U.S.C. 3561(a)(1), which provides that a "defendant who has been found guilty of an offense may be sentenced to probation unless * * * the offense is a Class A or Class B felony." [5] As the court of appeals noted in this case, the decision in *Daiagi*

[5] When the section defining an offense does not itself set forth a letter-grade classification, the letter grade is determined by 18 U.S.C. 3559, which classifies offenses based on their maximum term of imprisonment.

sheds little light on the issue presented here, because the statute at issue in *Daiagi*—unlike Section 841 (b) (1) (A)—did not explicitly bar probationary sentences "[n]otwithstanding any other provision of law." See Pet. App. 4-5. The Fourth Circuit's decision in *Wilson* is even farther afield, because the sentencing statute involved there did not bar probation.[6] Read in that context, the statements of the *Wilson* court regarding a district court's broad authority to impose probationary sentences in response to a Section 3553(e) motion are simply not applicable to this case, where a specific statute, Section 841(b) (1) (A), limits that authority.

2. Petitioner next contends (Pet. 11-14) that the district court, in response to the government's substantial assistance motion under 18 U.S.C. 3553(e), was entitled to determine the extent of its departure from the statutory minimum sentence by reference to factors unrelated to the quality of petitioner's assistance to the government.

Section 3553(e) states that a district court shall have the authority, on the government's motion, to impose a sentence below the statutory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Thus, the statute on its face makes it clear that the extent of a departure from a statutory minimum sentence under Section 3553(e) must be based on the quality of the assist-

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[6] The defendant in *Wilson* pleaded guilty to interstate travel in aid of an unlawful business involving controlled substances, in violation of 18 U.S.C. 1952(a) (3), which provides for a maximum sentence of five years. Pursuant to 18 U.S.C. 3559, the offense therefore was only a Class D felony, so the probation ban at issue in *Daiagi*—which applies only to Class A and Class B felonies—did not apply.

ance rendered by the defendant to the government. Morover, as the court of appeals noted, the related provision in Sentencing Guidelines § 5K1.1 buttresses that view.[7] That Guideline provides a list of factors that a district court may consider to arrive at the "appropriate reduction" when departing downward from the Guidelines range based on a "substantial assistance" motion filed by the government. Although the Guideline states that the listed factors are not intended to be exhaustive, we agree with the court of appeals that it is no coincidence that the factors listed in Section 5K1.1 all relate to the quality of the defendant's assistance to the government.[8] In sum, the

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[7] The Sentencing Guidelines provision is relevant in determining the extent of the departure from the statutory minimum sentence, because Section 3553(e) provides that a sentence imposed under its authority "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission."

[8] Section 5K1.1 provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;

court of appeals correctly concluded that the extent of a reduction in sentence "to reflect a defendant's substantial assistance" must be based only on factors relating to the quality of the defendant's assistance.

Contrary to petitioner's contention (Pet. 12-13), the court of appeals' decision does not conflict with the Fourth Circuit's decision in *United States* v. *Wilson*, *supra*. As discussed above, the *Wilson* panel held that a district court generally has authority to impose a sentence of probation when the government files a "substantial assistance" motion under Section 3553(e). 896 F.2d at 859-860. In the passage on which petitioner relies (Pet. 13), the *Wilson* court merely pointed out that Guidelines § 5K1.1 places no lower limit on the extent to which a district court can reduce a sentence. 896 F.2d at 859. Nothing in the *Wilson* opinion, however, addresses the entirely separate question whether a district court can determine the extent of a reduction in the sentence by reference to factors unrelated to the quality of the defendant's assistance.

3. Petitioner also contends (Pet. 14-18) that Sentencing Guidelines § 5H1.6 authorized a departure below the statutory minimum sentence based on petitioner's burdensome family responsibilities. This contention is incorrect, because it confuses departures from the Sentencing Guidelines range with departures from a statutory minimum sentence. Departures from a statutory minimum sentence are

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(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

triggered only by a substantial assistance motion under 18 U.S.C. 3553(e). For the reasons discussed above, we agree with the court of appeals that considerations unrelated to the defendant's assistance should not enter into a district court's decision to depart from a statutory minimum sentence under Section 3553(e); Sentencing Guidelines § 5H1.6 is not relevant to this inquiry. Accordingly, even if petitioner's family responsibilities would have justified a departure under Sentencing Guidelines § 5H1.6, they could not be used to justify a sentence below the statutory minimum sentence. See *United States* v. *Sharp*, 883 F.2d 829, 831 (9th Cir. 1989). At most, therefore, petitioner's family responsibilities would have been grounds for a departure from the Guidelines sentencing range of 151-188 months down to the statutory minimum sentence of ten years.

To be sure, the court of appeals did offer an interpretation of Sentencing Guidelines § 5H1.6 as an alternative basis for its conclusion that the district court should not have departed from the statutory minimum sentence based on petitioner's family responsibilities. See Pet. App. 6-8. Because that Guideline expressly states that family ties and responsibilities may be relevant when probation is an option, see note 4, *supra*, the court of appeals concluded that family responsibilities can never be relevant if probation is *not* a sentencing option. As petitioner points out (Pet. 15-16), several other courts of appeals have suggested that Sentencing Guidelines § 5H1.6 permits "extraordinary" family responsibilities to serve as grounds for a departure from the Sentencing Guidelines range. See, *e.g.*, *United States* v. *Shortt*, 919 F.2d 1325, 1328 (8th Cir. 1990); *United States* v. *Brand*, 907 F.2d 31, 32-33 (4th Cir.), cert. denied,

111 S. Ct. 585 (1990); *United States* v. *Brewer*, 899 F.2d 503, 508 (6th Cir), cert. denied, 111 S. Ct. 127 (1990); *United States* v. *Burch*, 873 F.2d 765, 768 (5th Cir. 1989). Although those decisions do not directly conflict with the decision of the court of appeals in this case, because none of them upheld a departure based on extraordinary family responsibilities in a case in which probation was not available as a sentencing option, we agree with petitioner that the analysis in those cases is in substantial tension with the analysis of the court of appeals in this case.

Notwithstanding the tension between the court of appeals' analysis here and the analysis of other courts of appeals interpreting Sentencing Guidelines § 5H1.6, several considerations suggest that further review is not warranted by this Court. First, as the discussion above makes clear, the court of appeals' discussion of Sentencing Guidelines § 5H1.6 was not necessary to its disposition of this case, which was adequately supported by its conclusion that the extent of a departure based on a Section 3553(e) motion must be determined only by reference to factors related to the defendant's assistance.

Moreover, the United States Sentencing Commission recently submitted an amendment of Section 5H1.6, which is scheduled to take effect on November 1, 1991, in the absence of any further action by Congress. 56 Fed. Reg. 22,762 (1991). That amendment deletes the specific language relied upon by the court of appeals for its conclusion in this case. *Id.* at 22,779.[9] Accordingly, if that amendment goes into

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[9] As amended, Sentencing Guidelines § 5H1.6 would provide:

effect as planned, it is unlikely that the court of appeals will continue to adhere to the interpretation of Sentencing Guidelines § 5H1.6 set forth in this case. The Sentencing Commission's revision of Sentencing Guidelines § 5H1.6 therefore eliminates any need for this Court to exercise its discretionary jurisdiction to resolve the issue presented here. Compare *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

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